Petition

81-1265

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

THOMAS L. EDEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NUTTER, BIRD, MARELLA,
BOXER & WOLPERT

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QUESTIONS PRESENTED

1. Was the jury improperly instructed as to the definition of conversion and did that error deny Petitioner a fair trial?

2. Was the jury properly instructed that the funds alleged in Counts one through seven of the indictment constituted government property as a matter of law?

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OPINION BELOW

The opinion of the Court of Appeals is not yet reported. A copy of the opinion is attached in our Appendix (App. A).

JURISDICTION

The jurisdiction of this Court is

invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT

1. PROCEEDINGS BELOW

On April 9, 1980, a Federal Grand Jury for the Central District of California returned an eleven count Indictment charging Thomas L. Eden (hereinafter, "Petitioner") with conversion of government funds and concealing material facts from the Department of Health Education and Welfare (hereinafter, "HEW") (C.R. 1).[1/] Thereafter, on May 30, 1980, a superseding indictment was returned in eleven counts charging Petitioner with the same violations (C.R. 4).

After hearings on numerous pretrial

1/ "C.R." refers to the Clerk's Record on Appeal.

motions, a jury trial commenced before the Honorable Lawrence T. Lydick, United States District Judge. On June 24, 1980, the jury found Petitioner guilty of each of the eleven counts in the Indictment.

On July 22, 1980, Petitioner was sentenced by the Court to the custody of the Attorney General for three years on each of counts one through eleven to run concurrently. The Court also imposed the maximum fine of $10,000.00 on each count consecutively for a total fine of $110,000.00 (C.R. 93). As part of the sentence the Court ordered that the Petitioner remain committed to custody until the entire fine is paid (C.R. 43, p. 2).

Petitioner filed a timely notice of appeal with the Ninth Circuit Court of Appeals and his case was heard on July

9, 1981. On October 26, 1981, the Circuit Court issued its Opinion finding error in a key jury instruction but affirming the conviction nonetheless. On December 14, 1981, the same Court denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

Petitioner is currently at liberty on bond pending appeal.

2. STATEMENT OF FACTS

In 1969, Petitioner founded Associated Colleges of California (hereinafter, "ACC"), which at that time had approximately ten students (R.T. 423).[2/] By 1975, the enrollment at ACC grew to between 600 and 800 students and its curriculum expanded

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2/ "R.T." refers to the reporter's transcript at trial.

from court reporting to clerk typing, computer programing, secretarial typing and general vocational training (R.T. 425).

Petitioner was the president and one of the owners of ACC (R.T. 423). He was primarily responsible for student recruiting and dealing with the financial community to arrange for student financing under the Federally Insured Student Loan (hereinafter, "FISL") program. His partner, Samuel Romano was responsible for the day to day operation of the school (R.T. 396, 424).

At various times between 1969 and 1975, ACC experienced cash flow problems. These cash flow problems were caused in part by the lag between the time federal funds were applied for and when they were received by ACC

(R.T. 426). As a result of the above, ACC made a loan in approximately 1974 in the amount of $130,000.00 from Union Bank. The proceeds of that loan were used to operate ACC and to help solve ACC's cash flow problem (R.T. 426-427). Petitioner personally guaranteed repayment of ACC's loan to Union Bank (R.T. 130, 426).

A large portion (approximately 50-60%) of the student body at ACC relied upon FISL program funding to finance tuition costs (R.T. 357, 427). However, in 1975 significant problems developed with FISL funding for ACC. The financial community substantially reduced commitments to the FISL program in general and there was virtually no FISL financing available (R.T. 356, 427). In addition, ACC developed a $100,000.00-$150,000.00

refund liability in its FISL program (R.T. 427). Petitioner met with officials of HEW to resolve ACC's refund liability but no agreement was reached (R.T. 427, 431).

Because of the problem with FISL refund liability, Petitioner sold ACC to Urban Didier, (hereinafter, "Didier") on July 8, 1975 (R.T. 431-432, Ex P).[3/] Didier owned Educational Management Advisors and another school in Los Angeles (R.T. 431). This school had experienced FISL refund liability problems in the past but Didier had been successful in resolving them with HEW (R.T. 431). ACC was sold to Didier for $160,000.00 and Didier executed a promissory note to

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3/ Mr. Romano's shares in ACC were bought prior to the sale to Didier (R.T. 433).

Petitioner for that amount (R.T. 431, Ex. P). Petitioner entered into a consulting agreement with Didier which extended over a two year period (R.T. 435, Ex. Q).

After the sale, Didier took over Petitioner's office at ACC, held meetings with the ACC employees and brought in his own staff to participate in running the school (R.T. 154, 203, 435-436). During this time, Samuel Romano continued to run ACC on a daily basis (R.T. 436).

Under the terms of the agreement of sale, Didier was to take over the assets of ACC and assume all liabilities of the school. Specifically, he was to assume personal liability for ACC's $130,000.00 loan from Union Bank (R.T. 437). Although Petitioner brought Didier to Union Bank to meet

the loan officer and to have the necessary documents prepared to transfer the loan, Didier later cancelled a number of appointments to execute the documents (R.T. 437-438).

Petitioner became somewhat suspicious of Didier's motives when Didier continually avoided executing the loan documents. He feared that Didier intended to take over the assets of ACC and would avoid assuming the responsibility for ACC's liabilities, particularly the Union Bank loan (R.T. 442-443). During this period Petitioner personally approached Didier and tried to get the loan documents signed. Didier did not execute the documents and continued to make excuses. To pacify Petitioner, Didier ultimately executed an indemnification agreement which purported to hold

Petitioner harmless from ACC's liabilities (R.T. 449, 454, Ex. S). However, shortly afterward, Didier retracted that agreement in substantial part (R.T. 456, Ex. T).

On September 18 or 19, 1975, Petitioner had a meeting with Samuel Romano at ACC (R.T. 439-440). During that meeting Romano informed Petitioner that blank checks on an ACC account had been stolen from ACC. Romano also gave Petitioner a packet of loan transfer documents which had been received from Union Bank (R.T. 440-441, Ex. R). Petitioner became upset when he realized that Didier had still not executed the loan documents (R.T. 441).

After their meeting, Petitioner and Samuel Romano went to Union Bank to resolve the issue of the stolen ACC

checks (R.T. 134, 442-443). They explained the situation to a bank employee who suggested that a new general account for ACC be opened (R.T. 120, 137-38, 414). When the new account was opened Petitioner became the sole signatory. This was done so that Petitioner could maintain control over the account until Didier assumed the liabilities of the school (R.T. 444-445).[4/]

Since ACC's old general account had a deficit balance, and since a new account could not be opened with a deficit balance, the banker instructed Petitioner to open the new account with a deposit. The banker then

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4/ As of September 20, 1975, Didier had still not assumed responsibility for the ACC loan or other school liabilities (R.T. 449).

suggested that Petitioner draw a check on the new account payable to the old account to create a zero balance and thus close the old account (R.T. 128-129, 138, 453-454). Petitioner followed these steps which had the effect of creating deficit balance of $17,309.60 in the new account (R.T. 453-454).

Petitioner also signed bank forms authorizing the transfer of funds from the various ACC program accounts,[5/] to the ACC new general account (R.T. 123-125, 446, Exs. 22-26). When this

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5/ These program accounts included: 1) Basic Education Opportunity Grant (hereinafter, "BEOG") account; 2) Supplemental Education Opportunity Grant (hereinafter, "SEOG") account; 3) National Direct Student Loan (hereinafter, "NDSL") account; 4) College Work Study (hereinafter, "CWS") account; and 5) National Institute of Health (hereinafter, "NIH") account.

transfer of funds to the general account occurred the deficit balance in that account was eliminated.[6/]

Petitioner testified that he believed the funds could properly be transferred from the ACC program accounts since a sufficient number of students had been enrolled in ACC and had properly qualified for loans and grants.[7/] In short, he testified that he thought that the funds belonged to ACC and could therefore be transferred to the general account and used

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6/ The transfer of the funds from the program accounts and elimination of the deficit balance in the general account formed the basis for the charge in Count Two of the Indictment. That count charged Petitioner with intentionally embezzling and converting $17,309.60 in government funds.

7/ There had been a 20% increase in enrollment at ACC in 1975 over the previous year (R.T. 392).

to pay operating expenses of the school (R.T. 447-48).

Union Bank had previously notified Petitioner that in order to complete transfer of the ACC loan to Didier a $5,000.00 payment to the bank was required to reduce the principal of the loan (R.T. 450, Ex. R). Accordingly, Petitioner made that payment with a check drawn on ACC's new general account (R.T. 451, Ex 19).[8/] Payments of the ACC loan had always been made from the general account and Petitioner testified that he

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8/ This $5,000.00 payment to Union Bank formed the basis for Count One of the Indictment which charged Petitioner with converting and embezzling government funds. Union Bank later withdrew $11,305.75 from ACC's general account and applied it to the outstanding loan balance. This was done without Petitioner's authorization (R.T. 532). No charges were ever filed against the bank.

did not think there was anything improper in making the loan payment in this manner (R.T. 450, 452).

Petitioner also issued a check drawn on the ACC general account to Jan Slort in the amount of $6,754.00 in payment for accounting services Slort had performed for ACC (R.T. 251-252, 458, Ex. 30).[9/] Another check was issued to a computer company called Halifax in the amount of $8,482.00 (R.T. 458, Ex. 35). Approximately $1,400.00 of this amount represented payment to Halifax for providing computerized attendance reports for ACC. The balance of this amount was returned to Petitioner (R.T. 232,

/ / /

9/ This formed the basis for Count Three of the Indictment.

458).[10] Petitioner also issued checks to three other companies as a means of having funds returned to him.[11]

Petitioner testified that checks were issued and the funds returned to him so that he could make payments on the ACC loan at Union Bank without Didier knowing that the payments were being made (R.T. 457). The ACC loan from Union Bank was ultimately paid back in full by Petitioner by June 1976 (R.T. 459-60, Ex. 30-A).

In late September, 1975, ACC closed for semester break. As a result of the sale agreement Didier was to reopen the

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10/ This formed the basis for Counts Five and Nine of the Indictment.

11/ Those companies included Cantex, (Counts Four and Eight), Cedar, Inc. (Counts Six and Ten), and Proctor Davis (Counts Seven and Eleven).

school after the break, however, the school was never reopened (R.T. 461).

ARGUMENT

I

The Jury Was Improperly Instructed As To The Definition Of Conversion And That Error Denied Petitioner A Fair Trial

Petitioner raised in his argument to the Court of Appeals the issue that the jury was improperly instructed as to the definition of conversion. In its published opinion the Court of Appeals agreed with Petitioner's contention and Ruled that the instruction that was given by the trial court incorrectly defined conversion. United States v. Eden, ___ F.2d ___; Slip Opinion at p. 5414 (9th Cir., Oct. 26, 1981); Appendix p. A-15. However, the Ninth Circuit then went on to find that the effect of the improper in-

struction was minimized when viewed in light of all of the other instructions. By adopting the government's argument of harmless error the Court of Appeals failed to understand the crucial impact of the instruction at issue when viewed as a part of the entire case. As a result, the Circuit Court's opinion as to the harmless nature of the error should be reversed.

The trial court gave the following instruction regarding the definition of conversion:

> "To convert money or property to one's own use or to the use of another means to apply, appropriate, or use, such money or property for the benefit of the wrongdoer or another.
>
> "Conversion includes misuse or abuse of property as well as use in an unauthorized manner or to an unauthorized extent." (R.T. 68). (Emphasis added)

The Court's instruction was a combination of two sources. The first source was Devitt & Blackmar, Federal Jury Practice and Instructions, §16.01. That instruction is the well accepted definition of conversion. The second source, however, was dicta found in Morissette v. United States, 342 U.S. 246 (1952). That dicta was a part of a discussion concerning how conversion may differ from various other types of theft including embezzlement and purloining. In that case, this Court stated in part:

> "Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it

> separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining." [Emphasis added]

Morissette v. United States, supra, 342 U.S. at 272.

It is the use of the language from this portion of Morissette as a jury instruction to which Petitioner took issue on appeal. The instruction which the government proposed, and the trial court used, distorted the Morissette opinion by excerpting certain language from the above cited dicta, taking it completely out of context, modifying it to the government's best interest, and offering it as the correct definition of conversion. Under no circumstances does the dicta from Morissette support the

instruction which was given. The Ninth Circuit recognized that fact when it ruled that the instruction "... gives an incomplete and therefore inaccurate definition of conversion." United States v. Eden, supra, Slip Opinion at p. 5414; Appendix p. A-8.

A review of the Morissette opinion shows that in the paragraph quoted above this Court was differentiating among various types of theft and was speaking in dicta about how certain facts may under certain circumstances constitute conversion. The government's instruction, which the trial court adopted, inappropriately took that same language, modified it by excluding the critical word "may," and tied it to the time tested definition found in Devitt & Blackmar. This modification was clearly improper and

highly prejudicial to Petitioner. The result was an inaccurate and grossly unfair definition of conversion.

The Ninth Circuit agreed with Petitioner's analysis of Morissette and stated so clearly when it held:

> "A fair reading clearly shows that the above was a recitation of examples -- nothing more. The court did not equate misuse with conversion nor did it hold that any misuse or abuse of property or use in any unauthorized manner automatically constitutes conversion and it did not undermine the need for a finding of a serious violation of the owner's right to control the use of the property. United States v. May, 625 F.2d 186 (8th Cir. 1980)."

United States v. Eden, supra, Slip Opinion at pp. 5414-5415; Appendix p. A-12.

The incorrect definition of conversion, which was condemned by the Ninth Circuit but which was given to the jury, defined the crime with which

Petitioner was charged as being complete upon a mere showing of use, abuse or unauthorized use of government property. That definition was clearly contrary to the principles which Morissette espoused when it commanded that a showing of intent was a critical element of the government's burden in conversion cases.

As more fully illustrated in the Statement of Facts, supra, it was apparent from the evidence that Petitioner's school was experiencing some difficulties. The school was involved in a transition of ownership and was experiencing some cash flow problems. However, the enrollment of students was up and Petitioner contended at trial that he believed that the necessary procedures with reference to the funds were followed and that his

actions were justified. This erroneous instruction as to the very basic definition of conversion was tantamount to the trial court instructing the jury to find Petitioner guilty if there was any evidence of unauthorized use of funds or any use in an unauthorized manner. Indeed, under the incorrect instruction given by the trial court, the jury was required to so find. The jury could therefore have convicted Petitioner simply if it believed that there had been any misuse of funds. Although the Court of Appeals recognized the obvious deficiencies of the instruction at issue it failed to appreciate the negative impact that the instruction had on Petitioner's case.

The government argued, for the first time in this case before the Ninth Circuit, that even if the defini-

tion of conversion as given was wrong, it was harmless in light of the jury instructions taken as a whole. The Ninth Circuit improperly adopted the government's theory and in the process held:

> "The second paragraph of the instruction does not clearly state the applicable principles and should be avoided in future cases. However, any error in the instruction was cured by the instructions as a whole when viewed in their entirety."

United States v. Eden, supra, Slip Opinion at p. 5415; Appendix p. A-15.

The Circuit Court's analysis, however, completely misses the mark and fails to take into consideration the effect which this threshold instruction had on the case as a whole.

Petitioner was charged with conversion. The entire case revolved around the issue of whether Petitioner

knowingly and wilfully converted government funds. If the jury was not instructed as to the correct definition of conversion, then the fact that all other instructions may have been correct is irrelevant and Petitioner has been unduly prejudiced and denied a fair trial. Stated another way, the jury must be provided with the correct definition of the crime with which Petitioner is charged. If that definition is incorrect, the jury's verdict is improper and the Circuit Court's failure in this case to recognize the prejudicial impact of the erroneous instruction mandates reversal.

The fact that the jury was instructed as to specific intent does not alleviate the prejudicial error. Because of the wording of the instruction regarding the definition of

conversion which was given, the element of intent was substantially diminished. The jury was plainly told that conversion "includes"[12/] misuse, abuse and use in an unauthorized manner of the subject property. Therefore, the jury was instructed that the mere misuse of government property constituted conversion punishable by federal law. In light of the evidence in this case, a conviction for mere misuse was possible and was indeed required by the trial court's instruction. Such a finding is contrary to law and instructing the jury in this

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12/ The instruction uses the word "includes" and did not use the words "may include" as stated in dicta in Morissette v. United States, supra, 342 U.S. at 270-721. There is an obvious and critical difference between the two. The language of the instruction is mandatory while that found in Morissette was merely permissive.

manner was plain error which cannot be viewed as harmless.

The incorrect instruction regarding the definition of conversion was clearly inconsistent and contrary to the specific intent instruction. At a minimum this conflict resulted in confusion in the jury's mind. If there is a possibility that the jury convicted on the basis of the erroneous definition of conversion, then Petitioner's conviction must be reversed. Reviewing the case and the instructions as a whole, there was more than a possibility that such a verdict occurred. The conviction should therefore have been reversed by the Circuit Court and consequently the granting of this petition is warranted.

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II

The Jury Was Improperly Instructed That The Funds Alleged In Counts One Through Seven Of The Indictment Constituted Government Property As A Matter Of Law

In its Opinion affirming Petitioner's conviction the Court of Appeals held that the trial court's jury instruction regarding the ownership of the property at issue "... appropriately narrowed the focus of the jury, but did not entirely take the issue from them [sic]". United States v. Eden, supra, Slip Opinion at p. 5416; Appendix p. A-20. The ruling of the Court of Appeals in this regard is clearly in error. It was not the intent of the government or of the trial court in giving the instructions which it did, to give to the jury any factual determination with respect to

the issue of ownership of the property. The failure to allow the jury to make a factual determination on this key element of the charges, effectively denied Petitioner his right to a trial by jury.

There are four elements which the government must prove to obtain a conviction for conversion. Ailsworth v. United States, 448 F.2d 439 (9th Cir. 1971). The second of the four elements requires that the government prove that the money belonged to the United States. In the case at bar the trial court improperly took this factual issue from the jury and ruled as a matter of law that the money belonged to the United States.

In its briefs before the Ninth Circuit, the government argued that the issue was totally one of law for the

trial court to decide. As a back-up position it argued for the first time that the factual issue was actually given to the jury after all. The Court of Appeals accepted that argument and held that the trial court had not taken the issue away from the jury. The ruling of the Court of Appeals and the government's position upon which it is based are erroneous and have no support whatsoever in the record.

The instruction at issue which was given to the jury provided as follows:

> "That money embezzled or converted belonged to the United States is also an essential element of the offense charged in Counts One through Seven of the indictment. You are instructed with respect to the money alleged to have been converted in Counts One through Seven of the indictment that: Although $4,568.40 of the money in the C.W.S. account belonged to the institution, the remaining, $92,162.70 of the funds in the

NIH, NDSL, BEOG, SEOG, and CWS account belonged to the United States, and only property disbursement in the full compliance with the regulations of the Department of HEW could legally change ownership of these funds." (R.T. 680-681) (Emphasis added)

The clear impact of this instruction was that "the funds in the ... accounts belonged to the United States...." The intent and meaning were unmistakable -- the funds in the various program accounts belonged to the United States. The lanaguage which follows regarding compliance with HEW regulations is nothing more than a surplus explanation of the trial court's finding.

The record plainly shows that the trial court, with the support of the government, decided the issue as a matter of law. There was never any intent on the part of the trial court

or the government to give this issue to the jury for its consideration. In deciding to give the version of the instruction proffered by the government, the trial judge stated:

> "As to the proposed versions found in government's 8 and defendant's 2, it is our view that there is no issue of fact here that the transactions alleged, that is the transfer of funds from the government to the various bank accounts and ultimately to the defendant, occurred.
>
> "The issue then becomes one of law for the Court under United States v. Brown, United States v. Jackson and United States v. Miller." (R.T. 581-582)(Emphasis added).

Petitioner proffered his own jury instruction which would properly have placed the critical element of ownership before the jury (C.R. 76, No. 2). That instruction was opposed by the government in its Objection to Defen-

dant's Proposed Jury Instructions where it stated "the question of federal ownership of funds is a legal question for the court." (C.R. 75, p.2). The trial court subsequently rejected Petitioner's proposed instruction and made a finding as a matter of law that the funds belonged to the United States (R.T. 581-582).

The instruction at issue is clearly inconsistent with other decisions of the Ninth Circuit and other Courts of Appeal. See: United States v. Alessio, 439 F.2d 803, 804 (1st Cir. 1971); Souza v. United States, 304 F.2d 274, 277 (9th Cir. 1962); United States v. Rowen, 594 F.2d 98, 100-101, (5th Cir. 1979).

In reaching its decision the Ninth Circuit relied upon United States v. Johnson, 596 F.2d 842 (9th Cir. 1979).

In that case the defendant contended that once federal funds were transferred to a redevelopment agency pursuant to a federal grant, the government had no right, title, or interest in them. This position was, of course, contrary to established law, since the government maintained control through its regulations over the funds. The court in Johnson, rejected the defendant's position and found that the funds belonged to the United States as a matter of law. United States v. Johnson, supra, 596 F.2d at 845.

The Johnson case differs significantly from the case at bar. In Johnson, supra, the facts were not in dispute and the only issue was a purely legal issue of ownership. There was no factual contention in Johnson as to whether or not the regulations had been

followed. In the instant case, however, there was a factual dispute as to whether or not actions were taken to comply with the regulations. The existence of this factual dispute bore directly on the issue of whether the funds in question were government funds or had become the funds of ACC. Since this case, unlike Johnson, involved a factual issue relating to the character of the funds, the issue should have been submitted to the jury for resolution. There is no justification whatever for not allowing the jury to decide such a basic and crucial issue in the case.

The Court of Appeals also relied upon United States v. Miller, 520 F.2d 1208 (9th Cir. 1975) to support the instruction at issue. However, United States v. Miller, supra, is also

factually and legally distinguishable from the case at bar. In United States v. Miller, supra, as in United States v. Johnson, supra, the defendant contended that once the government sent funds to a local agency, they were no longer government property. United States v. Miller, supra, 520 F.2d at 1210. For the reasons set forth in Johnson, this contention was meritless. Furthermore, in Miller, the check itself was the "thing of value" which was embezzled and it was stipulated that the check was a government check which was taken by the defendant and deposited into his personal account. United States v. Miller, supra, 520 F.2d at 1210. As in Johnson, there was a purely legal question as to title and ownership of the property. Unlike the case at bar there was no factual

issue for the jury to decide which determined whether or not the funds belonged to the government.

The final case cited to the Court of Appeals in support of affirming the conviction on this point was United States v. Jackson, 436 F.2d 39 (9th Cir. 1970). However, that case does not support the trial court's actions in deciding the issue of ownership as a matter of law. In fact, it supports Petitioner's position.

In Jackson the defendant was convicted of stealing a radio from a government-owned airplane. The radio was purchased by the government with the funds of a private club residing on a military base. A military regulation gave the government an interest in the radio and charges under Title 18 U.S.C.

/ / /

§641 were brought when Jackson stole it.

In that case, none of the facts concerning the status of the radio was challenged. The trial judge therefore instructed the jury that the radio was the property of the United States as a matter of law. The Ninth Circuit in Jackson upheld this procedure on the grounds that "[t]he trial judge in a criminal case may instruct the jury on a question of law which is based upon undisputed facts." [Emphasis added]. United States v. Jackson, supra, 436 F.2d at 41.

However, as has been stated earlier, the question of the ownership of the money in the case at bar was very much in dispute. There was evidence offered by both sides as to the requirements of the regulations and the actions which

were taken by the school's personnel to comply with the regulations (R.T. 357-359, 360-368, 371-374, 378, 387, 389-392, 398). The facts with respect the ownership issue were contested through the entire case and as a result, the issue should have been presented to the jury. The Ninth Circuit in its opinion failed to recognize this critical point and improperly ruled that the correct instructions were given.

In taking the element of the ownership of the money charged in the indictment away from the jury, the trial court denied Petitioner his constitutional right to a trial by jury. Furthermore, the trial court's instruction resulted in a de facto directed verdict against Petitioner. For these reasons, the

Petitioner's convictions on Counts One through Seven of the Indictment cannot stand and the Opinion of the Ninth Circuit Court of Appeals should be reversed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiori be granted.

Respectfully submitted,

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THOMAS L. EDEN

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Thomas L. Eden,
Defendant-Appellant.

No. 80-1468.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 9, 1981.

Decided Oct. 26, 1981.

Appeal from the United States District Court For the Central District of California.

Before HUG and FARRIS, Circuit Judges, and CLAIBORNE, District Judge.

CLAIBORNE, District Judge:

On April 9, 1980, a federal grand jury for the Central District of California returned an eleven count indictment charging Thomas L. Eden with violations of 18 U.S.C. §641, embezzlement and conversion of government funds (seven counts), and 18 U.S.C. §1001, concealing material facts from the

Department of Health, Education and Welfare (four counts).

Upon learning that a superseding indictment against the defendant was forthcoming, counsel for Eden moved the trial court for an order requiring certain exculpatory material (results of a polygraph test taken by defendant) to be presented to the grand jury. Eden's motion was denied and the grand jury returned a superseding eleven count indictment on May 30, 1980.

Eden was a founder and president of Associated Colleges of California, referred to during trial as A.C.C., a business college which participated in student financing under the Federally Insured Student Loan (F.I.S.L.) program through what was then the Department of Health, Education, and Welfare. A.C.C.

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participated in four separate educational programs which were the subject of the grand jury investigation: 1) the Supplemental Educational Grants Program (S.E.O.G.), 2) the College Work Study Program (C.W.S.), 3) the National Direct Student Loan Program (N.D.S.L.), and 4) the Basic Educational Opportunity Grants Program (B.E.O.G.).

In 1974, A.C.C. experienced "cash flow" problems and was forced to take out a loan in the approximate amount of $130,000 from Union Bank, repayment of which was personally guaranteed by defendant. A.C.C.'s financial difficulties continued, and in July, 1975, defendant sold A.C.C. to Urban Didier, with the provision that Didier was to assume personal liability for A.C.C.'s $130,000 loan from Union Bank.

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When A.C.C. first began participating in Federally Insured Student Loan programs, a number of special bank accounts, in addition to its general account, were established at Union Bank to handle the funds received from H.E.W. As president of A.C.C., Eden was a signatory on all checks.

In September, 1975, Eden became aware that Didier had not executed the necessary loan assumption documents and defendant was still personally liable on the $130,000 A.C.C. loan at Union Bank. Eden closed out all of the old accounts, including the N.I.H. and special program accounts, and transferred those funds into a new general account at Union Bank, which was the only new account opened. The total funds transferred amounted to $96,821.12, which was offset by a deficit balance

of $17,309.60 in the general account.

Eden testified he believed the above funds could be properly transferred from the special program accounts into the new A.C.C. general account because defendant believed the funds belonged to A.C.C. Donna Palmer, the Coordinator of Financial Aid at A.C.C testified she had shown the applicable H.E.W. regulations to defendant which mandate that under no circumstances could federal money be put directly into the A.C.C. general account from the various special program accounts. On or about September 22, 1975, upon learning that A.C.C. was closing down, Donna Palmer informed defendant that all allowable disbursements of special program funds had been made and that the remaining $100,000 had to go back to the federal government. Instead,

Eden drew certain checks on said accounts made payable to various individuals who in turn cashed the checks and delivered the bulk of the funds back to Eden.

At trial, defendant admitted the acts alleged in the indictment, but testifed the checks were issued and the funds returned so that he could make payments on the A.C.C. loan at Union Bank without Didier knowing. The $130,000 loan at Union Bank was paid in full by June 1976. A.C.C. closed for semester break in September, 1975 and never reopened.

Concluding a six-day trial, Eden was found guilty by a jury on all eleven counts of the superseding indictment, from which he appeals and assigns six errors: 1) The jury was improperly instructed as to the defini-

tion of embezzlement and conversion; 2) The jury was improperly instructed that the funds alleged in Counts One through Seven of the indictment constituted government property as a matter of law; 3) The trial court improperly quashed defendant's subpoena to the Secretary of Education; 4) The trial court erred in refusing to admit into evidence the results of a polygraph examination of the defendant; 5) The trial court erred in refusing to compel the government to present exculpatory evidence to the grand jury, including the results of a polygraph examination of the defendant; 6) The jury's verdict was not supported by sufficient evidence.

1) Was the jury improperly instructed as to the definition of conversion?

The trial court gave the following

instruction on conversion:

> "To convert money or property to one's own use or to the use of another means to apply, appropriate, or use, such money or property for the benefit of the wrongdoer or another.
>
> Conversion includes misuse or abuse of property as well as use in an unauthorized manner or to an unauthorized extent."

Eden attacks this instruction as completely negating the government's burden to prove specific intent and provided the jury with a confusing and incorrect definition of conversion. We agree that the instruction, standing alone, gives an incomplete and therefore inaccurate definition of conversion.

The government proposed the instruction which was given by the court. It is conceded in the briefs that the instruction is a modified version of §16.01 Devitt and Blackmar, Federal Jury Practice and Instructions and founded on Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).

The corpus of the modification was taken from the following language in Morissette:

> "The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances. Probably every

stealing is a conversion, but certainly not every knowing conversion is a stealing. 'To steal means to take away from one in lawful possession without right with the intention to keep wrongfully.' Irving Trust Co. v. Leff, 253 N.Y. 359, 364, 171 N.E. 569, 571. Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession of the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's

custody for limited use. (Emphasis added.) Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without

interpreting it to punish unwitting conversions."

A fair reading clearly shows that the above was a recitation of examples — nothing more. The court did not equate misuse with conversion nor did it hold that any misuse or abuse of property or use in any unauthorized manner automatically constitutes conversion and it did not undermine the need for a finding of a serious violation of the owner's right to control the use of the property. United States v. May, 625 F.2d 186 (8th Cir. 1980).

Indeed, the court held to the contrary, stating at page 254:

"Had the statute applied to conversions without qualification, it would have made crimes of all unwitting,

inadvertent and unintended conversions. Knowledge, of course, is not identical with intent and may not have been the most apt words of limitation. But knowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. In the case before us, whether the mental element that Congress required be spoken of as knowledge or as intent, would not seem to alter its bearing on guilt. For it is not apparent how Morissette could have knowingly or inten-

tionally converted property that he did not know could be converted, as would be the case if it was in fact abandoned or if he truly believed it to be abandoned and unwanted property." And at pages 254 and 255: "The purpose which we here attribute to Congress parallels that of codifiers of common law in England and in the States and demonstrates that the serious problems in drafting such a statute is to avoid gaps and loopholes between offenses. It is significant that the English and State codifiers have tried to cover the same type of conduct that we are

> suggesting as the purpose of Congress here, without, however, departing from the common law tradition that these are crimes of intendment.
>
> We find no grounds for inferring any affirmative instruction from Congress to eliminate intent from any offense with which this defendant was charged."

The second paragraph of the instruction does not clearly state the applicable principles and should be avoided in future cases. However, any error in the instruction was cured by the instructions as a whole when viewed in their entirety.

It is well established in this circuit that an instruction is not

abstract; rather, the whole trial is the proper scope of inquiry. United States v. Federbush, 625 F.2d 246, 255 (9th Cir. 1980); Stoker v. United States, 587 F.2d 438, 440 (9th Cir. 1978); United States v. James, 576 F.2d 223 (9th Cir. 1978); United States v. Pallan, 571 F.2d 497 (9th Cir. 1978).

Here the requirement of specific intent was not omitted. The trial judge gave the following instruction prior to the definition of conversion:

> "The crime charged in Counts One through Seven of the indictment is a serious crime which requires proof of a specific intent before the defendant can be convicted. Specific intent as the term implies, means more than the general intent to commit the

act.

> To establish specific intent as required in Counts One through Seven, the government must prove the defendant acted with intent to appropriate money belonging to the United States, to a use inconsistent with the owner's rights and benefits."

The jury was also instructed that the government must show beyond a reasonable doubt that "the defendant acted knowingly, willfully and with the intent to appropriate the money to a use inconsistent with the owner's rights and benefits." Viewed as a whole, the instructions were not misleading and fairly and adequately instructed the jury as to the definition of conversion.

2) Was the jury improperly instructed that the funds alleged in Counts One through Seven constituted government property as a matter of law?

Over defendant's objection, the trial court gave the following instruction regarding the funds at issue:

> "That money embezzled or converted belonged to the United States is also an essential element of the offense charged in Counts One through Seven of the indictment. You are instructed with respect to the money alleged to have been converted in Counts One through Seven of the indictment that: Although $4,658.40 of the money in the C.W.S.

account belonged to the institution, the remaining $92,162.70 of the funds in the NIH, NDSL, BEOG, SEOG, and CWS account belonged to the United States, and only proper disbursement in the full compliance with the regulations of the Department of HEW could legally change ownership of these funds."

Eden argues that the above instruction was improper in that it took the issue of government ownership from the jury. Eden, relying heavily on United States v. Alessio, 439 F.2d 803 (1st Cir. 1971), urges that this issue as to the title of the property is a finding of fact that must be left to the jury. In Alessio, the trial court refused to allow any evidence support-

ing the defendant's contention that the property at issue did not belong to the government. Eden, however, omits languages from Alessio that is most applicable here:

> "The court could properly make a ruling of law with respect to title, predicated upon findings of fact which it left to the jury. However, it is clear that the court did more. It left nothing to the jury."

The trial court's instruction regarding the ownership of the funds appropriately narrowed the focus of the jury, but did not entirely take the issue from them. Whether or not there had been proper disbursement of the funds, in full compliance with the regulations of the Department of

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H.E.W., was a factual issue left to the jury.

The trial court's instruction is not inconsistent with this court's decisions in United States v. Jackson, 436 F.2d 39 (9th Cir. 1980), cert. denied, 403 U.S. 906, 91 S.Ct. 2209, 29 L.Ed.2d 682 (1971); United States v. Miller, 520 F.2d 1208 (9th Cir. 1975); and United States v. Johnson, 596 F.2d 842 (9th Cir. 1979). In United States v. Miller, supra, we said "whether an item is government property ordinarily is a question of law, and when the facts so establish, it is proper for the court to give such an instruction."

In United States v. Johnson, supra, we approved the "ownership" analysis under §641 enunciated by the Fifth Circuit in United States v. Evans, 572 F.2d 455 (5th Cir. 1978),

which also involved funds administered under the Federal Direct Student Loan Program expressly adopting the following language:

> "The critical factor in determining the sufficiency of the federal interest in intangible interests, such as are involved here, is the basic philosophy of ownership reflected in relevant statutes and regulations. The key factor involved in this determination of federal interest is the supervision and control contemplated and manifested on the part of the government."

The trial court's instruction was appropriate under the facts of this case.

3) Was the quashing of defendant's subpoena to the Secretary of Education improper?

Eden subpoenaed documents from the Department of Education for production prior to trial under Rule 17(c), Federal Rules of Criminal Procedure. The subpoena requested documents in five categories, four of which are relevant to this appeal:

> A. Any and all books, papers, documents or other objects which relate or refer to the California Business College and the allocation and payment to the California Business College of student financial aid funds through the National Institute of Health, College Work Study Program, National Defense Student Loan Program, National Direct Student

Loan Program, Basic Educational Opportunity Grant for the period from January, 1974 to January, 1976.

B. Any and all books, papers, documents or other objects which relate or refer to California Business College and its accreditation and/or loss of accreditation.

C. Any and all books, papers, documents or other objects which relate or refer to the payment of $100,000 to Associated Colleges of California, 661 South Burlington Avenue, Los Angeles, California 90057 by way of Treasury Check No. 83,760,968 dated September 15, 1975 and further designated on its face, "NIHA280".

D. Any and all books, papers,

documents or other objects which relate or refer to the allocation and/or payment of student funds through the National Institute of Health, College Work Study Program, National Defense Student Loan Program, National Direct Student Loan Program, Basic Educational Opportunity Grants, and/or Supplemental Educational Opportunity Grants to institutions which were unaccredited at the time the allocation and/or payment was made, for the period January, 1974 to January, 1976.

The government moved to quash the subpoena. The trial court found that much of the material was otherwise procurable reasonably in advance of trial by the exercise of due diligence, or not so voluminous as to require

pretrial production.

Eden argues that the trial court abused its discretion in so ruling. The party seeking to use the use of a subpoena under Rule 17(c) Federal Rules of Criminal Procedure, must show: 1) relevancy, 2) admissibility, and 3) specificity. United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039. In order to justify a subpoena for production before trial, the proponent must also demonstrate that the subpoenaed materials are not available from any other source and their examination and processing should not await trial in the circumstances shown. These determinations are of course committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon determination of factual

issues.

Eden failed to meet his burden in a number of respects. He failed to make any show of relevancy other than mere conclusory statements. The record also reveals that the discovery documents provided to Eden by the government adequately covered his contention on appeal.

4) Did the trial court err in refusing to admit into evidence the results of a polygraph examination of the defendant?

Eden made a pretrial motion to admit the results of a polygraph examination into evidence which the court denied.

Eden voluntarily submitted to a polygraph examination concerning whether or not he intentionally concealed facts from H.E.W. and whether or

not he intentionally converted government funds to his own use. Attached to Defendant's motion was a six-page declaration by Theodore Paul Ponticelli regarding his qualifications as a polygraph expert and the results of the examination administered to Defendant.

The trial judge refused to allow the results of the examination based on United States v. Urquidez, 356 F.Supp. 1363 (C.D.Cal., 1973)); United States v. Marshall, 526 F.2d 1349 (9th Cir. 1975); and United States v. Alexander, 526 F.2d 151 (8th Cir. 1975). It was the trial court's opinion that the unstipulated examination was lacking in control questions and other safeguards and appeared even less likely to have produced a credible response than those reported in the above cases.

Eden concedes that whether to

allow polygraph evidence is clearly within the discretion of the trial court. In United States v. Marshall, supra, this court stated " . . . a trial court will rarely abuse its discretion by refusing to admit the [polygraph] evidence, even for a limited purpose and under limited conditions." See also United States v. Demma, 523 F.2d 981, 987 (9th Cir. 1975) (en banc). We see no evidence of an abuse of the trial court's discretion in refusing to allow this evidence.

5) Did the trial court err in refusing to compel the government to present exculpatory evidence to the grand jury, including the results of a polygraph examination of the defendant?

The only exculpatory evidence defendant refers to is the results of the polygraph examination. Relying on

United States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979) and United States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978), Eden argues that the trial court should have required the government to present the polygraph evidence before the grand jury as an exercise of the court's supervisory power to prevent government impropriety in grand jury investigations.

This court's holding in United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978), aptly applies here, when it said:

> "The grand jury need not be advised of all matters bearing on the credibility of potential witnesses. Dismissal of an indictment is required only in flagrant cases in which the grand jury

has been overreached or deceived in some significant way, as where perjured testimony has knowingly been presented. There is nothing shocking to the conscience in the circumstances here."

Under this "flagrant case" standard, it is difficult to understand how it could be said that the trial court abused its discretiion in refusing to compel the government to present evidence, which at a later hearing is determined to be inadmissable.

The trial court properly refused to allow the above mentioned evidence.

6) Was there sufficient evidence presented at trial to find the defendant guilty beyond a reasonable doubt of the offenses charged in the indictment?

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Defendant challenges the sufficiency of the evidence to sustain the conviction on all counts, specifically charging there was insufficient evidence to support a finding of criminal intent.

The relevant inquiry on review is whether " . . . after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Applying this standard this court must consider all of the evidence, including that offered by the defense. United States v. Lopez, 625 F.2d 889 (9th Cir. 1980).

The evidence establishes that Eden

was aware of the regulations governing the H.E.W. special programs since he personally signed the agreements pertaining to the same. He was aware of the fact that specific accounts existed to handle these funds separately from the school's own funds since he had established these accounts himself and was signatory thereto. He was familiar with the fact that the college was required to and did apportion the disbursement of federal funds so that a student's funds were not disbursed until the midpoint of the award period. Miss Palmer, the coordinator of financial aid at A.C.C. had advised Eden that federal funds could not be put directly into the college's general account from the various special program accounts. Miss Palmer

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additionally had shown Eden the regulations which required that procedure. Miss Palmer also advised Eden that about $100,000 remaining in the special accounts were required to go back to the government because all possible disbursements had been made under the program.

The evidence clearly shows that Eden disregarded this information and deposited the special funds into one general account. The evidence clearly demonstrates that Eden then laundered much of this federal money through a general exchange program with other persons and companies.

Under the circumstances, a rational trier of fact could have found all of the essential elements of the crime established beyond a reasonable doubt including that of criminal

intent.

We affirm.